IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 14TH NOVEMBER 2007 / 23RD KARTHIKA 1929

SA.No. 406 of 1994()

AS.107/1990 of SUB COURT, PAYYANNUR
OS.223/1988 of MUNSIFF COURT, THALIPARAMBA
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APPELLANT: RESPONDENT:DEFENDANT:

PALLIPARAMBATH MARIYAUMMA,
W/O.ALI MUKRI,
RESIDING AT PARIYARAM AMSOM,
THIRUVATTOOR DESOM,
HOUSE NO.P.P.X.114.

BY ADV. SRI.M.P.ASHOK KUMAR

RESPONDENTS: APPELLANTS/PREDECESSOR-IN-INTEREST OF RESPONDENTS (PLAINTIFFS):
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1. **THUNTHAKACHI PUTHIYA PURAYIL ABDUL AZEEZ, PARIYARAM AMSOM, THIRUVATTOOR DESOM.**
2. **MAYANAKARAKATH ABDUL SALAM, ...DO..DO...**
3. **KADERKUTTY ABDUL AZEEZ, ...DO..DO...**
4. **UMMER KUTTY, ..DO..DO...**
5. **MARIYUMMA, ...DO...DO...**
6. **RAZAK, ...DO.....DO.....**
7. **SAHITHA, ...DO...DO.....**
8. **SAINABHA (MINOR), REP. BY RESPONDENT NO.1.**
9. **SIDDIQUE (MINOR),....DO...DO....**
10. **MAYANAKARAKATH ALIYUMMA, ..DO..DO...**

BY ADV. SRI.T.A.RAMADASAN for Respondents

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 14/11/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 406 OF 1994

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DATED THIS THE 14th DAY OF NOVEMBER, 2007

JUDGMENT

Defendant in O.S.223 of 1988 on the file of Munsiff Court, Taliparamba is the appellant. Husband of the deceased plaintiff is the respondent. Plaintiff instituted the suit seeking a decree for permanent prohibitory injunction contending that plaint A schedule property belongs to him under Ext.A1 gift deed dated 26.11.1956 and plaint B schedule property is the western portion of plaint A schedule property and plaintiff is in possession of the property which lies further west of plaint B schedule property and she has no right over the B schedule property and she is attempting to trespass into the plaint schedule property. It was contended that appellant has attempted to demolish the boundary ridge separating plaint B schedule property from the property of appellant. A Commission was taken out. Commissioner submitted Ext.C2 report. Thereafter plaint was got amended claiming a decree for mandatory injunction and damages contending that appellant has completely demolished the boundary ridge and also cut and removed trees standing there and thereby caused damages. Appellant resisted the suit

contending that plaintiff has right only over the property in R.s.26/11 and the property of appellant is in R.S.26/12 and there was dispute regarding the survey boundary which was settled by Taluk Surveyor and it was found that the disputed property is the property of appellant and appellant did not attempt to trespass into the said property or commit any damages as alleged and the suit is only to be dismissed. Commissioner subsequently inspected the property once again and submitted Ext.C3 report and C1 plan. Plaint A schedule property was demarcated as plot C and plaint B schedule property as plot A1 and property of appellant as plot A. Trial court, on the evidence of Pws 1 and 2, DW1, Ext.A1 and A2 and Ext.B1 to B4, dismissed the suit holding that appellant did not establish her right and possession over plaint B schedule property. Respondent challenged the decree and judgment before Sub Court, Payyannur in A.S.107 of 1990. When the appeal was pending, original plaintiff died and respondent husband being the legal heir was impleaded as additional second appellant. Appellant filed a cross-objection contending that trial court should have granted cost also while dismissing the suit. First appellate court as per judgment dated 24.2.1994 found that plaint B schedule property is plot A1 as

marked in Ext.C1 plan and reports of the Commissioner show that a ridge was existing on the western boundary of plot A1 separating plot A and property of appellant and trees were standing therein and the ridge was demolished and the trees were cut by appellant and the ridge was the separating boundary between the property of appellant and respondent and plaintiff has been in possession of the disputed plaint B schedule property namely plot A1 and therefore she is entitled to the decree for mandatory and prohibitory injunction. Appeal was allowed and suit was decreed. It is challenged in the second appeal.

2. Second appeal was admitted formulating the following substantial questions of law.

1) Is not the burden on the plaintiff to prove possession of the property to get a decree for prohibitory injunction.

2)Whether first appellate court was correct in granting a decree for injunction in respect of R.S.26/12, which is not the subject matter of the suit.

3)Whether first appellate court was justified in granting a mandatory injunction in the absence of evidence to prove the existence of the alleged ridge on the western boundary of the

disputed property.

3. Learned counsel appearing for appellant and respondent were heard. The argument of the learned counsel appearing for appellant is that respondent has no right over any portion of the property comprised in R.S.26/12 and under Ext.A1, he has title to only the property in R.S.26/11 and plaint B schedule property which is the disputed plot is in R.S.26/12 and therefore first appellate court should have found that respondent has no right over the plaint schedule property and the disputed property forms part of the property of appellant and therefore the decree granted is unsustainable. It was also argued that there is no evidence to prove that a ridge was existing separating the two properties or that it was demolished by appellant and in such circumstances, the decree granted is unsustainable.

4. Learned counsel appearing for respondents pointed out that first appellate court elaborately appreciated the evidence and relying on Ext.C2 and C3 reports, it was found that a ridge was in existence on the western boundary of the disputed plaint B schedule property, which was serving as the boundary separating the property of respondent and appellant. It was pointed out that existence of the trees, which were admittedly

cut by appellant was proved by Ext.C2 and C3 reports and it establish that the ridge was demolished subsequently by appellant to anex the disputed portion of the property and appellant has no right to do so and first appellate court rightly granted the decree and appeal is only to be dismissed.

5. True, under Ext.A1, the original plaintiff obtained the property comprised in R.S.26/11. But Ext.A1 shows that though the property is in R.S.26/11, it is comprised within the boundaries and within the measurements of 19 ½ X 23 ½ six feet koles. The western boundary of the property covered under Ext.A1 is shown as the property in the possession of appellant. Appellant did not produce the document relating to her property. Learned Sub Judge, on appreciation of evidence, found that a ridge was serving as the boundary separating the property obtained by respondent under Ext.A1 and the property of appellant which lies to its west. The fact that trees were existing on the ridge probabilise the case of respondent that the ridge was a common boundary between the two properties. Ext.C2 report submitted by the Commissioner after inspection of the property on the date of institution of the suit, establish that an attempt was made just before the institution of the suit to

remove the ridge by cutting the trees. Ext.C3 report submitted by the Commissioner later shows that when Commissioner inspected the property subsequently ridge was completely removed and the area to the east of western ridge and plot C was tilled. Ext.C3 report also shows that before the Commissioner appellant admitted cutting of the trees from the ridges and tilling of the soil was carried out by appellant. In such circumstances, no further evidence is necessary to prove that ridge was demolished and trees on the ridge were cut and removed by appellant. It is on that basis first appellate court found that the demolition of the ridge was by appellant.

6. Added to this, first appellate court found that Ext.B3 adangal extract as well as tax receipts produced by appellant show that appellant has been in possession of only 80 cents. Plot A is admittedly in the possession of appellant. It is having an extent of 80 cents. If the disputed plot A1, having an extent of 1 ¾ cents is also taken as part of the property of appellant, the total extent would be 81 ¾ cents. Therefore payment of tax by appellant for 80 cents as shown in the adangal extract prove that appellant is in possession of only 80 cents. The existence of a ridge separating the disputed plot A1 from plot A, as rightly

found by first appellate court, establish that the demolished ridge which was existing on the western boundary of Ext.A1 was the common boundary separating the property of appellant and respondent. The property which lies to the east of that ridge has been in the possession of the plaintiff as part of the property obtained under Ext.A1. Therefore though the disputed plot A1 is in R.S.26/12 and Ext.A1 only shows that the property is in R.S.26/11, evidence establish that respondent has been in possession of the disputed portion comprised in R.s.26/12 also. It is on that basis the decree was granted. I do not find any merit in the appeal. It is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-

M.SASIDHARAN NAMBIAR, J

SA 406/1994

JUDGMENT

14.11.2007